

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROLYN MCCOY,) NO. CV 08-04217 SS
Plaintiff,)
v.) **MEMORANDUM DECISION AND ORDER**
MICHAEL J. ASTRUE,)
Commissioner of the Social)
Security Administration,)
Defendant.)

INTRODUCTION

Carolyn McCoy ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her application for Supplemental Security Income ("SSI"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. This matter is before the Court on the parties' Joint Stipulation ("Jt. Stip.") filed on April 15, 2009. For the reasons stated below, the decision of the Commissioner is AFFIRMED.

PROCEDURAL HISTORY

A. Initial Application

On March 20, 2002, Plaintiff filed an application for SSI. (Administrative Record ("AR") 73-75). Plaintiff claimed disability resulting from blood clots, pulmonary embolism, swollen legs, shortness of breath and chest pains. (AR 79). Plaintiff stated that the disability began on August 29, 1990. (AR 73).

The Agency denied Plaintiff's application. (AR 47-50). Plaintiff sought a hearing before an administrative law judge ("ALJ"). (AR 51). A hearing was held before ALJ Zane A. Lang on November 19, 2002. (AR 21-45). On February 19, 2003, the ALJ issued a decision denying benefits. (AR 9-19). Plaintiff requested review of the ALJ's decision before the Appeals Council. (AR 7). On June 5, 2003, the Appeals Council denied Plaintiff's request for review. (AR 4-6).

Plaintiff filed a complaint in the Central District of California seeking review of the decision. On December 8, 2003, the parties stipulated to a remand that required the ALJ to clarify his findings in regard to Plaintiff's residual functional capacity ("RFC").¹ (AR 280-281). The parties also stipulated that the ALJ must provide clear and convincing reasons if the new decision did not adopt the treating physician's opinion. (AR 280-81).

¹ Residual functional capacity is "what [one] can still do despite [his] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

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2 **B. Rehearings And Instant Complaint**
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4 Accordingly, the ALJ held hearings on May 10, 2005 (AR 627-37), and
5 on November 2, 2005. (AR 580-604). On February 14, 2006, the ALJ
6 issued a decision denying benefits. (AR 468-83). Plaintiff requested
7 review by the Appeals Council. (AR 494-95). The Appeals Council vacated
8 the ALJ's decision because he relied upon the testimony of a vocational
9 expert ("VE") from the 2002 hearing in calculating Plaintiff's RFC. (AR
10 504). The Appeals Council remanded for a new hearing. (AR 507-8).

11
12 On April 9, 2008, Plaintiff's hearing went forward before ALJ
13 Alexander Weir III. (AR 605-26). ALJ Weir also found that Plaintiff
14 was not entitled to benefits. (AR 276-78). On June 30, 2008, Plaintiff
15 filed the present action.

16
17 **FACTUAL BACKGROUND**
18

19 **A. Generally**
20

21 Plaintiff was born on February 2, 1960, and was forty-two years old
22 when she filed for disability benefits. (AR 220). Plaintiff has a
23 twelfth grade education,² but never graduated or received a GED. (AR
24 619). Plaintiff has never worked. (AR 617).

25
26 ² There is an inconsistency in the record regarding Plaintiff's
27 education. At her first hearing and on her SSI application, Plaintiff
28 stated she had an eighth grade education. (AR 37-8, 85). At the April
2008 hearing, though, Plaintiff testified that she attended school until
twelfth grade, but did not graduate. (AR 619).

B. Relevant Medical History

1. Treating Physician

Plaintiff's treating physician at the time of the hearings was Elizabeth J. Covington, M.D. (AR 174, 576). In an undated Medical Provider Evaluation ("MPE") form, Dr. Covington diagnosed Plaintiff with deep vein thrombosis³ ("DVT"), morbid obesity and thyroid dysfunction. (AR 390). Dr. Covington assessed Plaintiff as temporarily disabled with a projected recovery date of July 16, 1999. (Id.). In a MPE form dated February 23, 2000, Dr. Covington diagnosed Plaintiff with morbid obesity and thyroid dysfunction. (AR 247, 389). Dr. Covington, in contrast to her earlier finding, now classified Plaintiff as permanently disabled. (AR 247, 389). In a subsequent undated form, Dr. Covington diagnosed Plaintiff with chronic thrombophlebitis⁴, osteoarthritis, morbid obesity and thyroid dysfunction. (AR 230). However, Dr. Covington, again changing her opinion, found that Plaintiff was temporarily disabled and listed April 15, 2002 as the projected recovery date. (AR 230). Plaintiff underwent an echocardiogram on June 4, 2001. (AR 186-87). The study revealed the left atrium to be at the upper limits of "normal," and found trace mitral regurgitation. (AR 186-87). The left

³ Deep vein thrombosis is a blood clot that occurs in a deep (as opposed to superficial) vein, usually in the legs. See <http://www.webmd.com/heart-disease/tc/deep-vein-thrombosis-topic-overview> (last visited May 28, 2009).

⁴ Thrombophlebitis is a circulatory problem that develops when a blood clot slows the circulation in a vein, leading to irritation. See <http://www.webmd.com/a-to-z-guides/understanding-thrombophlebitis-basics> (last accessed May 28, 2009).

1 ventricular ejection fraction was 64% and the left ventricular wall
2 motion was normal. (AR 186). A chest X-ray taken on June 14, 2001
3 showed an infiltrate over the left lower lobe and moderate cardiomegaly
4 with changes suggesting hypertension and hilar calcifications. (AR
5 183).

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7 On July 10, 2001, Dr. Covington referred Plaintiff to pulmonary
8 specialist Sucha Kim, M.D. (AR 180). Dr. Kim diagnosed Plaintiff with
9 purulent sputum, possible bronchitis, and airway inflammation. (AR 168-
10 71). On August 30, 2001, Dr. Covington completed a form allowing
11 Plaintiff to receive a disabled identification card from the Los Angeles
12 County Metropolitan Transportation Authority. (AR 221). Dr. Covington
13 listed Plaintiff's conditions as morbid obesity, thyroid dysfunction,
14 status post thrombophlebitis, status post DVT and inferior vena cava
15 filter. (Id.).

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17 In a subsequent undated MPE form, Dr. Covington diagnosed Plaintiff
18 with chronic thrombophlebitis, osteoarthritis, morbid obesity and
19 thyroid dysfunction. (AR 223). Dr. Covington listed Plaintiff as
20 temporarily disabled with a projected recovery date of August 2002. (AR
21 223). In an MPE form dated October 17, 2002, Dr. Covington expressed
22 the view that Plaintiff could do light or sedentary work, but only for
23 twenty hours a week. (AR 222, 272). An EKG on November 5, 2002
24 indicated atrial fibrillation⁵ and a nonspecific T wave abnormality. (AR

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26 ⁵ Atrial fibrillation is the most common type of irregular
27 heartbeat, where many impulses begin simultaneously in the atria. This
28 leads to a very rapid and disorganized heartbeat. See
<http://www.webmd.com/heart-disease/atrial-fibrillation/heart-disease-atrial-fibrillation-basics> (last accessed May 28, 2009).

1 256). On February 10, 2003, Dr. Covington referred Plaintiff to
2 cardiologist Ruth Strauss, M.D. (AR 438-42). Dr. Strauss listed DVT
3 and hypertension for Plaintiff's medical history. (AR 440).
4 Plaintiff's weight was 425 pounds. (AR 439). Dr. Strauss' diagnoses
5 were status post DVT and hypertension. (AR 439-40).

6

7 On January 7, 2004, Avena Flaherty, PA-C, completed a Physical RFC
8 Questionnaire.⁶ (AR 293-97). P.A. Flaherty listed Plaintiff's diagnoses
9 as chronic thrombophlebitis, status post deep thrombosis, status post
10 stent insertion and morbid obesity. (AR 293). She noted Plaintiff's
11 limitations as being able to lift and carry ten pounds occasionally,
12 less than ten pounds frequently, could stand and walk for less than two
13 hours in an eight-hour workday and that she could sit for six hours in
14 an eight-hour workday. (AR 294-97).

15

16 On March 3, 2005, Dr. Covington also completed a Physical RFC
17 Questionnaire. (AR 345-49). She listed Plaintiff's diagnoses as DVT,
18 hypothyroidism, atrial fibrillation and morbid obesity. (AR 345). She
19 noted Plaintiff's limitations as being able to lift and carry ten pounds
20 occasionally, lift and carry less than ten pounds frequently and being
21 able to stand, sit, and walk less than two hours in an eight-hour
22 workday. (AR 346-49). On March 9, 2005, Dr. Covington ordered a series
23 of tests. (AR 375-77). An abdominal ultrasound showed multiple
24 gallstones and a fatty liver, a lumbar spine X-ray revealed a

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27 ⁶ A PA-C is a physician's assistant. P.A. Flaherty works for the
28 Center 4 Health Medical Group, the same group as Dr. Covington. (AR
293).

1 straightened lordotic curve, and a right hip X-ray was negative for
2 fractures. (AR 375-76). Chest X-rays showed cardiomegaly. (AR 376).

3

4 On March 23, 2005, Dr. Covington referred Plaintiff to cardiologist
5 Gerald F. Bresnehan, M.D. (AR 421, 423). Dr. Bresnehan assessed that
6 Plaintiff suffered from morbid obesity, palpitations and tachycardia.
7 (AR 428-29). On April 25, 2005, gastroenterologist Stephen Parnell,
8 M.D., examined Plaintiff. (AR 366). Dr. Parnell found that Plaintiff's
9 abdomen was non-tender and diagnosed Plaintiff with asymptomatic
10 cholelithiasis and fatty liver. (Id.). Dr. Covington completed another
11 undated MPE form that listed diagnoses of thyroid dysfunction, status
12 post DVT, status post inferior vena cava filter placement and recurrent
13 thrombophlebitis. (AR 371). Dr. Covington found that Plaintiff could
14 perform light and sedentary work for thirty hours a week. (Id.). She
15 also found that Plaintiff could participate in either a job search or
16 education program of at least thirty hours a week. (Id.).

17

18 On November 21, 2007, Plaintiff underwent laboratory testing that
19 indicated that her fasting glucose was within normal limits. (AR 498).
20 On that same date, Dr. Covington referred Plaintiff to the offices of
21 the West Gastroenterology Medical Group. (AR 503). Plaintiff's weight
22 was over 350 pounds. (AR 516). Plaintiff received a diagnosis of iron-
23 deficiency anemia. (Id.).

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1 **2. Consultative Physician**

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3 On May 1, 2002, internist John Sedgh, M.D., examined Plaintiff.
4 (AR 200-204, 271). Dr. Sedge recorded Plaintiff's weight and height at
5 375 pounds and 69 inches, respectively. (AR 201). Dr. Sedgh noted that
6 Plaintiff was a "42-year-old female who presents with PE, DVT and
7 asthma." (AR 204). Dr. Sedgh found that Plaintiff "can lift and carry
8 without limitations . . . can sit, stand and walk without limitations .
9 . . [s]he does not have any postural limitations or manipulative
10 limitations." (AR 204). On May 20, 2002, the Disability Determination
11 Service ("DDS") concluded that Plaintiff's only limitation was to avoid
12 concentrated exposure to fumes, odors and dusts. (AR 209-15).

13
14 **3. Medical Expert**

15
16 At the April 9, 2008 hearing, Harvey L. Alpern, M.D., testified
17 regarding Plaintiff's limitations. (AR 611-16). Dr. Alpern has served
18 as the President of the Board of Directors of the American Academy of
19 Disability Evaluating Physicians and is an Assistant Clinical Professor
20 of Medicine at the University of California, Los Angeles. (AR 561,
21 563). Dr. Alpern received his medical degree from the University of
22 Southern California School of Medicine in 1964 and currently works in
23 private practice specializing in cardiology and internal medicine. (AR
24 561).

25
26 Dr. Alpern reviewed Plaintiff's medical records before testifying.
27 (AR 611-12). Dr. Alpern stated that Plaintiff's DVT was a past
28 condition and that there was no evidence of it having a present effect

1 on Plaintiff. (AR 612-13). Dr. Alpern testified that Plaintiff's
2 hypothyroidism was being successfully treated. (AR 613). Dr. Alpern
3 interpreted Plaintiff's EKGs as not being indicative of atrial
4 fibrillation. (Id.). Dr. Alpern testified that Plaintiff's morbid
5 obesity would limit her to lifting ten pounds frequently and twenty
6 pounds occasionally. (AR 615). Dr. Alpern further testified that
7 Plaintiff would be limited to standing and walking for two out of eight
8 hours and sitting for six out of eight hours. (Id.). He testified that
9 Plaintiff should also be restricted from heights and dangerous equipment
10 because of her history of syncope. (Id.). Dr. Alpern testified that
11 the edema resulting from Plaintiff's morbid obesity is not in itself
12 impairing. (AR 616). He testified that it would be reasonable for
13 Plaintiff to elevate her legs during breaks, before and after work.
14 (Id.).

15

16 **4. Other Medical History**

17

18 On August 29, 1990, Plaintiff suffered a pulmonary embolism and, as
19 a result, remained at the Harbor-UCLA Medical Center until September 7,
20 1990. (AR 105-108). On March 7, 1999, Plaintiff went to the California
21 Hospital Medical Center after a syncope attack. (AR 129-34). The
22 attending physicians reported that Plaintiff had a history of pulmonary
23 embolus, deep vein thrombosis and hypothyroidism. (AR 129-34). A
24 pulmonary arteriogram suggested the presence of a thromboembolism. (AR
25 119-20). On March 12, 1999, Plaintiff underwent an inferior vena cava
26 filter placement. (AR 116). Attending physician Mushtaq A. Khan, M.D.,
27 prescribed Coumadin to Plaintiff, (AR 115), and subsequently discharged
28 her with diagnoses of recurrent pulmonary embolism, status post inferior

1 vena cava filter placement, obesity, and a history of hypothyroidism,
2 (AR 113). On July 7, 2001, Plaintiff went to the emergency room of the
3 California Hospital Medical Center because she had developed shortness
4 of breath after walking uphill. (AR 110-12). Plaintiff received a
5 diagnosis of pneumonia. (AR 110).

6

7 On October 30, 2003, Plaintiff went to the Centinela Hospital
8 Medical Center after complaining of a cough, fever and a sharp left-
9 sided chest pain. (AR 305-10). Tests showed that Plaintiff's lungs
10 were clear, and an EKG was unremarkable. (AR 305-6). On May 14, 2004,
11 Plaintiff went to the Centinela Hospital emergency room after having
12 fallen while on a bus. (AR 298-304). An X-ray of her lumbosacral spine
13 indicated mild degenerative changes of the lumbar spine. (AR 304). The
14 impression in the emergency room report was status post fall and lumbar
15 contusion. (AR 302). On May 24, 2007, Plaintiff went to the emergency
16 room at the Memorial Hospital of Gardena because she had experienced a
17 syncope episode. (AR 530-37). A CT scan and neurological exam were
18 normal. (AR 541-42). A knee X-ray showed that Plaintiff had a bone
19 spur. (AR 543). Plaintiff's EKG indicated a normal sinus rhythm and
20 non-specific anterior T wave changes. (AR 540).

21

22 **5. Plaintiff's Subjective Pain Testimony**

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24 Plaintiff testified at the April 9, 2008 hearing. (AR 616-22).
25 Plaintiff stated that she cannot walk without a cane. (AR 617).
26 Plaintiff testified that she could only walk one city block because of
27 edema-induced leg pain. (Id.). Plaintiff also testified that she

1 elevates her legs for approximately two hours a day because without
2 elevation she is subject to swelling and throbbing. (AR 617-18).

3

4 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

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6 To qualify for disability benefits, a claimant must demonstrate a
7 medically determinable physical or mental impairment that prevents him
8 from engaging in substantial gainful activity⁷ and that is expected to
9 result in death or to last for a continuous period of at least twelve
10 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42
11 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
12 incapable of performing the work he previously performed and incapable
13 of performing any other substantial gainful employment that exists in
14 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
15 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

16

17 To decide if a claimant is entitled to benefits, an ALJ conducts a
18 five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

19

20 (1) Is the claimant presently engaged in substantial gainful
21 activity? If so, the claimant is found not disabled. If
22 not, proceed to step two.

23

24 (2) Is the claimant's impairment severe? If not, the
25 claimant is found not disabled. If so, proceed to step
three.

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27

28 ⁷ Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1520, 416.910.

1 (3) Does the claimant's impairment meet or equal the
2 requirements of any impairment listed at 20 C.F.R. Part
3 404, Subpart P, Appendix 1? If so, the claimant is found
4 disabled. If not, proceed to step four.

5 (4) Is the claimant capable of performing her past work? If
6 so, the claimant is found not disabled. If not, proceed
7 to step five.

8 (5) Is the claimant able to do any other work? If not, the
9 claimant is found disabled. If so, the claimant is found
10 not disabled.

11
12 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
13 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§
14 404.1520(b)-(g)(1), 416.920(b)-(g)(1).

15
16 The claimant has the burden of proof at steps one through four, and
17 the Commissioner has the burden of proof at step five. Bustamante, 262
18 F.3d at 953-54. If, at step four, the claimant meets his burden of
19 establishing an inability to perform the past work, the Commissioner
20 must show that the claimant can perform some other work that exists in
21 "significant numbers" in the national economy, taking into account the
22 claimant's residual functional capacity, age, education and work
23 experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1). The
24 Commissioner may do so by the testimony of a VE or by reference to the
25 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart
26 P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240
27 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
28 (strength-related) and nonexertional limitations, the Grids are

1 inapplicable and the ALJ must take the testimony of a VE. Moore v.
2 Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

3

4 **THE ALJ'S DECISION**

5

6 At step one, the ALJ found that Plaintiff had not engaged in any
7 substantial gainful activity since March 20, 2002, stating that "the
8 claimant has not worked since March 20, 2002."⁸ (AR 269).

9

10 At step two, the ALJ found that Plaintiff's severe impairments are
11 morbid obesity and a history of DVT. (AR 269). The ALJ relied upon the
12 medical records and Dr. Alpern's testimony to find that Plaintiff had
13 severe impairments because of her morbid obesity and her history of DVT.
14 (AR 269, 613).

15

16 At step three, the ALJ found that Plaintiff does not have an
17 impairment or combination of impairments that meets or medically equals
18 the criteria of a listing from Appendix 1, Subpart P, Regulations No. 4.
19 20 CFR 416.920(d), 416.925 and 416.926 (AR 275). The ALJ noted that
20 obesity was deleted from the listings in October 1999. (Id.).
21 Furthermore, he found that her history of DVT fails to meet or equal
22 listing 4.11 or listing 4.12. (Id.).

23

24 At step four, the ALJ found that Plaintiff has the RFC for light
25 work with limitations. (AR 275). The ALJ found that Plaintiff could

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27 ⁸ The record indicates that Plaintiff has never worked, but did
28 volunteer helping to label books at a school. (AR 602).

1 lift and carry ten pounds frequently, but could only occasionally lift
2 and carry twenty pounds. (Id.). The ALJ further found that she could
3 stand and walk for up to two hours in an eight-hour workday, but that
4 she must use a cane for walking. He found no limitations for sitting,
5 but precluded Plaintiff from working around unprotected heights and
6 moving machinery. (AR 275). However, the ALJ could not ascertain
7 whether she would be able to perform any past work, in part because it
8 appears that she had not worked for fifteen years prior to the hearing,
9 although the record is inconsistent on this point. (AR 276).

10
11 At step five, the ALJ found that there are a jobs in the national
12 economy that Plaintiff can perform. (AR 277). The ALJ found that
13 Plaintiff was a "younger individual" pursuant to 20 CFR 416.963 because
14 she was forty-two years old when the application was filed. (Id.).
15 Further, the ALJ concluded that Plaintiff had limited education because
16 she attended high school through twelfth grade. (Id.); See 20 CFR
17 416.964. The ALJ found Plaintiff had the ability to communicate in
18 English. (AR 277). Transferability is not an issue because Plaintiff
19 has not had a past job. (Id.); See 20 CFR 416.968.

20
21 The ALJ relied on the testimony of VE Sandra Schneider in reaching
22 his conclusion that Plaintiff was not disabled. (ALR 277, 622-25). The
23 ALJ found that Plaintiff could work as an assembler or an order clerk.
24 (AR 623).

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The court may set aside the Commissioner's decision when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing that conclusion, the court may not substitute its judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21.

DISCUSSION

The ALJ Provided Specific And Legitimate Reasons For Giving Less Weight To The Treating Physician's Opinion

Plaintiff contends that ALJ erred by failing to give appropriate weight to her treating physician's opinion. (Jt. Stip. at 5-7, 10-12).

1 More specifically, Plaintiff argues that the ALJ improperly "split the
 2 difference between a treating source and a non-examining source to come
 3 up with his residual functional capacity assessment." (Jt. Stip. at 6).
 4 Plaintiff states that the ALJ simply selected Dr. Alpern's proposed RFC
 5 because it was a compromise between the position of Dr. Covington and
 6 the DDS. (Jt. Stip. at 11). Plaintiff asserts that the ALJ did not
 7 provide the required justification for according less weight to Dr.
 8 Covington's opinion. (Jt. Stip. at 5, 12). This Court disagrees.
 9

10 Although the treating physician's opinion is entitled to great
 11 deference, it is "not necessarily conclusive as to either the physical
 12 condition or the ultimate issue of disability." Morgan v. Comm'r of
Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999). "When there is
 14 conflicting medical evidence, the Secretary must determine credibility
 15 and resolve the conflict." Matney v. Sullivan, 981 F.2d 1016, 1019 (9th
 16 Cir. 1992) (citing Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984)).
 17 When a treating doctor's opinion is contradicted by another doctor, "the
 18 Commissioner may not reject his opinion without providing 'specific and
 19 legitimate reasons' supported by substantial evidence." Lester v.
Chater, 81 F.3d 821, 830 (9th Cir. 1995). "The opinion of a
 21 nonexamining medical advisor cannot by itself constitute substantial
 22 evidence that justifies the rejection of the opinion of an examining or
 23 treating physician." Morgan, 169 F.3d at 602. However, a court can
 24 reject such an opinion "based in part on the testimony of a nontreating,
 25 nonexamining medical advisor." Id. (emphasis in original); See also
Magallanes v. Bowen, 881 F.2d 747, 751-755 (9th Cir. 1989) (affirming an
 27 ALJ's decision awarding less weight to a treating physician based on the
 28 testimony of a nonexamining physician that was consistent with evidence

1 in the record). In addition, the ALJ need not accept the opinion of any
2 physician, including a treating physician, if that opinion is brief,
3 conclusory, and inadequately supported by clinical findings. See
4 Matney, 981 F.2d at 1019; Batson v. Comm'r of Soc. Sec., 359 F.3d 1190,
5 1195 (9th Cir. 2004).

6

7 Here, the ALJ did provide specific and legitimate reasons for
8 giving less weight to Dr. Covington's opinions. The ALJ's opinion
9 demonstrates that Dr. Covington's opinion was "unsupported by the record
10 as a whole." Batson, 359 F.3d at 1195.

11

12 Dr. Covington opined that Plaintiff could sit, stand, and walk for
13 only two hours of the day. She also stated that, while Plaintiff could
14 perform light and sedentary work, Plaintiff would be limited to thirty
15 hours per week. This opinion contrasted with Dr. Covington's earlier
16 report that stated Plaintiff would be limited to twenty hours a week.
17 Dr. Covington's evaluations were inconsistent, listing Plaintiff as
18 temporarily disabled, later as permanently disabled, and subsequently as
19 temporarily disabled.

20

21 The ALJ adopted Dr. Alpern's RFC because he found it to be "an apt
22 reflection of the medical evidence in this case." (AR 276). The ALJ
23 supported this conclusion by citing several instances in Plaintiff's
24 medical record that indicate many of her conditions do not have an
25 adverse effect on her ability to work. The ALJ, in evaluating
26 Plaintiff's limitations, took into account her morbid obesity and her
27 past history of DVT. (AR 276). However, the ALJ noted that, aside from
28 Plaintiff's morbid obesity, "none of the claimant's other impairments

1 has a significant impact on her functional capacity." (AR 276). Dr.
2 Alpern's testimony fully supported this conclusion.

3

4 The ALJ provided examples from the medical evidence that undermined
5 Dr. Covington's conclusions. For instance, the ALJ noted that Plaintiff
6 has been free from blood clots since 1999, which he finds to be a result
7 of the installation of the inferior vena cava filter and the use of
8 prescription drugs to combat the condition. (AR 276). Because Dr.
9 Covington repeatedly lists chronic thrombophlebitis⁹ in her MPE forms,
10 the fact that Plaintiff has been clot free since 1999 suggests that Dr.
11 Covington's evaluations are inaccurate.

12

13 The ALJ further noted that since Plaintiff started taking blood
14 pressure medicine "the medical records show that her blood pressure has
15 been generally under good control." (AR 276). The ALJ also cites the
16 normal EKG tests as casting doubt on the impairments caused by
17 Plaintiff's alleged palpitations and noted the lack of evidence for
18 ischemia in the record. (AR 276). The medical evidence, therefore,
19 provides specific and legitimate reasons to afford less weight to Dr.
20 Covington's opinion.

21

22 The ALJ also relied on Dr. Alpern's testimony, the medical expert,
23 as a legitimate reason for awarding less weight to Dr. Covington's
24 opinion. (AR 276). The testimony of a medical expert "may serve as
25 substantial evidence when [it is] supported by other evidence in the

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27 ⁹ A condition that develops when a blood clot slows the
28 circulation in a vein, leading to irritation. See note 4.

1 record and [is] consistent with it." Andrews v. Shalala, 53 F.3d 1035,
2 1041 (9th Cir. 1995). Dr. Alpern, after reviewing the medical record,
3 found that the only impediment to Plaintiff's functioning was her morbid
4 obesity. (AR 612-14). Dr. Alpern testified that Plaintiff had received
5 treatment for her blood clots and hypothyroidism. (AR 612-613). Dr.
6 Alpern also noted that Plaintiff's edema-induced leg pain would not
7 interfere with her ability to work because any necessary elevation could
8 be done "during breaks, before and after work." (AR 616). Dr. Alpern's
9 testimony, along with the objective indications in the record that
10 certain conditions listed by Dr. Covington were no longer adversely
11 affecting Plaintiff, is another legitimate reason to grant less weight
12 to Plaintiff's treating physician's opinion. The ALJ thus provided
13 specific and legitimate reasons, supported by the record and Dr.
14 Alpern's testimony, for his decision not to give controlling weight to
15 the treating physician's opinion.

16
17 Plaintiff contends that Orn v. Astrue, 495 F.3d 625 (9th Cir.
18 2007), governs this case. Although Orn dealt with an ALJ disregarding
19 a treating physician's opinion, it is distinguishable. In Orn, the
20 ALJ's reasons for rejection were actually contradicted by the record.
21 Orn, 495 F.3d at 634. Here, the ALJ expressly pointed to
22 inconsistencies that existed in the record and in the recorded diagnoses
23 and alleged disabilities of Plaintiff.

24
25 The ALJ relied upon objective medical evidence and the testimony of
26 Dr. Alpern in concluding Plaintiff was not entitled to benefits. The
27 ALJ noted specific parts of the record that indicated discrepancies
28 between the Dr. Covington's opinion and Plaintiff's actual condition.

1 Furthermore, Dr. Alpern provided testimony indicating that Dr.
2 Covington's opinions were inconsistent with the medical record. These
3 were specific and legitimate reasons for awarding less weight to the
4 treating physician's opinion. Accordingly, the ALJ did not err in
5 denying Plaintiff benefits.

6

7 **CONCLUSION**

8

9 Consistent with the foregoing, and pursuant to sentence four of 42
10 U.S.C. § 405(g),¹⁰ IT IS ORDERED that judgment be entered AFFIRMING the
11 decision of the Commissioner and dismissing this action with prejudice.
12 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
13 Order and the Judgment on counsel for both parties.

14

15 DATED: June 12, 2009.

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17 _____ /s/
18 SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE
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26 _____
27 ¹⁰ This sentence provides: "The [district] court shall have power
28 to enter, upon the pleadings and transcript of the record, a judgment
affirming, modifying, or reversing the decision of the Commissioner of
Social Security, with or without remanding the cause for a rehearing."